

STATE OF INDIANA)
) SS: IN THE ALLEN SUPERIOR COURT
COUNTY OF ALLEN) CAUSE NO. 02D01-0312-PL-680

STATE OF INDIANA,)
)
 Plaintiff,)
)
 v.)
)
MIKEN INDUSTRIES,)
d/b/a EVERDRY WATERPROOFING OF)
FORT WAYNE,)
)
 Defendant.)

CONSENT JUDGMENT

Plaintiff, State of Indiana, by Attorney General Stephen Carter and Deputy Attorney General Eric Jackson, and Defendant, Miken Industries d/b/a Everdry Waterproofing of Ft. Wayne, hereby enter into this Consent Judgment without trial and adjudication of any issue of fact or law.

General Provisions

1. The parties have agreed to this Consent Judgment to resolve the disputes raised in Plaintiff's Amended Complaint, and to address the continued business activity of Defendant. This Consent Judgment does not constitute an admission by Defendant of any violation of law, nor shall it be construed as Plaintiff's abandonment of its position that Defendant has violated Indiana law. The parties consent to entry of a final judgment in this proceeding by the Court and accept this Consent Judgment as final on the issues resolved herein.

2. This Court has subject matter jurisdiction and personal jurisdiction over Defendant and the matters raised in Plaintiff's Complaint.
3. This Consent Judgment does not preclude Plaintiff from pursuing any civil or criminal action with respect to the acts or practices of Defendant not covered by this Consent Judgment, or any acts or practices of Defendant conducted after the effective date of this Consent Judgment. Nor shall this Consent Judgment prevent any of the Defendant's customers from pursuing any private causes of action they may have against the Defendant, except for those customers specifically identified in paragraph 10 below.
4. This Consent Judgment applies to Defendant as well as its agents, employees, representatives, successors, and assigns.
5. Definitions. The following definitions apply throughout this Consent Judgment, unless otherwise specifically stated:
 - a. "Attempt," for purposes of numbered paragraphs 8.g.ii and 11, means an event measured by either (i) each thirty (30) day period passing after a customer's service request or complaint or (ii) Defendant's provision to the customer of the affirmation statement described in numbered paragraph 8.f (other than an affirmation statement made upon tender or upon completing an inspection), whichever occurs first.
 - b. "Punch List Items" means items remaining for Defendant to complete, but not necessary for the proper or effective functioning of, Defendant's waterproofing system or other product or service.
 - c. "Purchase price" means the price paid by a customer toward the purchase of Defendant's product or service, including but not limited to any finance charges or

payments to third-party lenders, taxes, permit fees, or other charges associated with the purchase or financing of Defendant's product or service.

- d. "Tender" means the point at which Defendant substantially completes installation of its waterproofing system, or other product or service, so that only punch list items remain for completion.
- e. "Franchisor" means EverDry Marketing and Management Inc., the corporate headquarters that sells/licenses the Everdry franchises, located at 365 E. Highland Rd., Macedonia, OH 44056.

Injunctive Provisions

- 6. Injunction Against Violating Indiana Code §§ 24-5-11-1 through -14. Defendant is permanently enjoined from violating any provision of the Indiana Home Improvement Contracts Act, currently codified at Ind. Code §§ 24-5-11-1 through -14. This injunction shall be construed to include, but not be limited to, the following:
 - a. In the course of entering into home improvement transactions, before the customer makes any payment toward the home improvement and before Defendant begins work toward completion of the home improvement, Defendant shall give the customer a written, completed home improvement contract which includes at a minimum the following:
 - i. the name of the customer and the address of the residential property that is the subject of the home improvement;
 - ii. the name and address of Defendant, and each of the telephone numbers and names of any agent to whom customer problems and inquiries can be directed;

- iii. the date the home improvement contract was submitted to the customer and any time limitation on the customer's acceptance of the home improvement contract;
- iv. a reasonably detailed description of the proposed home improvements;
- v. if the description required by Ind. Code § 24-5-11-10(a)(4) (restated as numbered paragraph 6.a.iv) does not include the specifications for the home improvement, a statement that the specifications will be provided to the customer before commencing any work and that the home improvement contract is subject to the customer's separate written and dated approval of the specifications;
- vi. the approximate starting and completion dates of the home improvements;
- vii. a statement of any contingencies that would materially change the approximate completion date;
- viii. the home improvement contract price; and
- ix. signature lines for Defendant or Defendant's agent and for each customer who is to be a party to the home improvement contract with a legibly printed or typed version of each person's name placed directly after or below the signature; and

b. In the course of entering into home improvement transactions, Defendant shall not use a home improvement contract that is not in a form that each customer who is a party to it can reasonably read and understand.

7. Injunction Against Violating Ind. Code §§ 24-5-0.5-1 through -12. Defendant is permanently enjoined from violating any provision of the Indiana Deceptive Consumer

Sales Act, currently codified at Ind. Code §§ 24-5-0.5-1 through -12. This injunction shall be construed to include, but not be limited to, the following:

- a. Defendant shall not misrepresent the effectiveness of its products or services, or in any other way misrepresent the performance, characteristics, or benefits of its products or services;
- b. Defendant shall not misrepresent that it, its employees, or its products or services have a recognition, certification, or endorsement, or in any other way misrepresent that they have approval or sponsorship;
- c. Defendant shall not misrepresent that it, its employees, or its products or services are of a particular standard or quality;
- d. Defendant shall not act to lessen, eliminate, or nullify the benefits of any warranty it contracts to provide to customers;
- e. Defendant shall not misrepresent that its products or services involve or do not involve a warranty or other rights, remedies, or obligations;
- f. Defendant shall not misrepresent that it is able to deliver or complete, or that it will deliver or complete, its products or services within a stated period of time, or within an unstated reasonable period of time;
- g. Defendant shall advise prospective customers of any difference in effectiveness between the different products or services it offers or may offer to the customers; and
- h. In describing warranty coverage and exclusions, Defendant's contracts shall:
 - i. explicitly state what types of issues or problems Defendant will service and what types of issues or problems it will not service, and Defendant's contracts shall

describe such coverage and exclusions in terms of what parts of the customer's basement, crawlspace, or other area serviced are covered or excluded; and

- ii. conspicuously disclose and group together all disclaimers regarding the effectiveness of its products or services, and all provisions affecting any warranty it contracts to provide to customers.

8. Injunction Requiring Implementation of Customer Service Protocol. In all transactions with customers, Defendant's practices shall comply with the following:

- a. Defendant shall promptly and thoroughly document customer service requests or complaints, as well as its response to the requests or complaints. The documentation Defendant maintains pursuant to this paragraph shall consist of at least the following for each service request or complaint:
 - i. the customer's name;
 - ii. the date and time of the customer's service request or complaint;
 - iii. a detailed description of the nature of the issue or problem giving rise to the customer's request or complaint;
 - iv. the name of Defendant's agent, employee, or representative who received the customer's service request or complaint;
 - v. the date and time of Defendant's visit to inspect, repair, or otherwise service the issue or problem;
 - vi. the name of Defendant's agent, employee, or representative who performed the inspection, repair, or other service;
 - vii. a detailed description, which includes work specifications, of all planned inspection, repair, or other service to be performed by Defendant;

- viii. a detailed description, which includes work specifications, of all inspection, repair, or other service performed by Defendant; and
 - ix. detailed notes and correspondence related to the follow-up performed by Defendant pursuant to numbered paragraph 8.e.
- b. Defendant shall prioritize customer service requests or complaints based upon the severity of the customer's reported problem. Defendant shall set forth its prioritization policy in writing and shall provide all customers to whom the policy applies with a copy of the policy.
- c. Defendant shall direct calls from customers having questions regarding their contracts or seeking service for their systems to the person identified on Defendant's contract with those customers pursuant to numbered paragraph 6.a.ii. In the event the person responsible for dealing with customer inquiries is no longer employed by Defendant, is otherwise unavailable, or changes from that person identified in the contract, Defendant shall provide the customer with the name of an alternate person to accept the customer's call. In any event, the person accepting service calls shall be a person with the expertise to effectively and thoroughly document and troubleshoot the customer's issue or problem, and with the authority to schedule binding service calls for Defendant's inspectors and other service personnel.
- d. Defendant shall promptly schedule and perform inspections, repairs, or other services.
- e. Defendant shall promptly follow up with customers to determine whether the inspection, repair, or other service it performs has resolved the customer's issue or problem, or whether further services are required.

- f. *Affirmation Statement.* Upon tender of new installations, and upon completion of any inspection, repair, or any other service performed by Defendant, Defendant shall give the customer a detailed written statement describing the service performed. This statement shall be signed and dated by Defendant's representative, affirming that the service described was in fact performed. The statement shall also be signed and dated by the customer, acknowledging the customer's receipt of the written statement. Defendant's delivery of product or provision of service shall not be complete until Defendant obtains the customer's signature acknowledging the customer's receipt of the completed affirmation document.
- g. *Warranty Service/Refund Protocol.* In all transactions with customers occurring on or after the date the Court approves this Consent Judgment in which Defendant offers a warranty or continued services for a waterproofing system or other goods or service, the following provisions shall govern Defendant's practices under such warranty:
- i. For thirty (30) days following the date Defendant tenders the waterproofing system or other goods or service to a customer, it shall have the opportunity to complete punch list items. Work performed to complete these punch list items during these thirty days shall not be counted against the number of times Defendant otherwise has to repair its system or other goods or service as set forth in numbered paragraphs 8.g.ii or 8.g.iii.
 - ii. On the thirty-first (31st) day following the date Defendant tenders the waterproofing system or other goods or service to a customer, and thereafter for a period continuing for so long as the customer's warranty or service contract with Defendant is renewed, Defendant shall have five (5) attempts or one (1)

year to repair the system or other goods or service following a customer's service request or complaint. This period shall begin to run upon the date Defendant first receives the customer's request for service or complaint. If Defendant is unable to repair the system or other goods or service so that it functions to keep the basement, crawlspace, or other area for which it was installed dry, or so that it functions as otherwise represented, following the fifth (5th) attempt or within one (1) year, whichever occurs first, Defendant shall refund the purchase price paid by the customer within thirty (30) days of the customer's report of the product's or service's failure.

- iii. Any attempted or actual repair or other service made under numbered paragraph 8.g.ii shall not involve a significant extension or modification to the system or other goods or service as it was originally installed, unless such extension or modification is necessary to make the system or other goods or service function as described in numbered paragraph 8.g.ii, unless the customer consents to such extension or modification, and unless the extension or modification is completed at no additional cost to the customer. In the event any attempted or contemplated repair involving a significant extension or modification to a consenting customer's system or other goods or service as it was originally installed cannot be completed for any reason, other than the customer's refusal to allow the completion, Defendant shall refund the purchase price paid by the customer within thirty (30) days of learning that the repair or other service cannot be completed.

- iv. In addition to Defendant's other record-keeping obligations, Defendant shall keep records documenting all refunds made under numbered paragraphs 8.g.ii and 8.g.iii.
 - v. Defendant shall give to customers with whom it contracts conspicuous written notice, in a document separate from all other contract documents, of the customers' rights under numbered paragraphs 8.g.i through 8.g.iii.
 - h. Defendant shall retain all documents received or produced pursuant to numbered paragraphs 8.a through 8.g for a period of three (3) years from the date of the documents' creation, and shall make such records available for inspection by the Office of the Indiana Attorney General upon the latter giving one (1) week written notice of its intent to inspect such records.
9. Injunction Requiring Training and Agent/Employee Expertise. Defendant shall take all measures necessary to effectuate the following:
- a. Defendant shall require all inspection and service personnel, as well as any person to whom customer service requests or complaints are directed, to attain certification to at least the "Level 2" proficiency level, measured by the Everdry Development Manual, or comparable document, developed and provided by the Franchisor, within thirty (30) days of beginning employment with Defendant. Defendant shall suspend from duties any employee who does not attain a Level 2 proficiency level within thirty (30) days of employment, and shall not allow that employee to work until s/he has attained the Level 2 proficiency level.
 - b. Defendant shall make all reasonable efforts to ensure that an employee who has attained a Level 3 or greater proficiency level is present at each customer's job site at

all times during the installation or provision of Defendant's goods or services. This provision shall not be construed to require an employee with Level 3 or greater proficiency to be present when such presence is not reasonably possible or required.

- c. In each of its transactions with customers or prospective customers, Defendant shall be considered to have represented to its customers or prospective customers that all employees have received sufficient training and have sufficient experience, knowledge, and skills to correctly perform the duties those employees actually perform on the customer's job.

Compensatory Provisions

10. Restitution. Defendant shall pay consumer restitution in the amount of Twenty-Eight Thousand and Seven Hundred Ninety-Five Dollars (\$28,795.00) to the following consumers in the following amounts:

- a. *Customer Redmond*. Defendant shall pay Eight Thousand Five Hundred Dollars (\$8,500.00) as restitution to customer Patrick Redmond of Hartford City, Indiana.
- b. *Customers Dellingers*. Defendant shall pay Ten Thousand Six Hundred Ninety Dollars (\$10,690.00) as restitution to Lewis & Noema Dellinger of Ft. Wayne, Indiana.
- c. *Customers Mohlers*. Defendant shall pay Nine Thousand Six Hundred and Five Dollars (\$9,605.00) as restitution to customers Adam & Michelle Mohler of Columbia City, Indiana.
- d. *Customer Ambrose*. Within one (1) year of the date this agreement is approved by the Court, Tara Ambrose of Ft. Wayne Indiana shall file a written notice with the Indiana Office of Attorney General that states if any water has seeped into her basement

during the past year. If water has seeped into her basement, the Defendant agrees to refund Ambrose Eleven Thousand Nine Hundred Twenty-Eight Dollars (\$11,928.00), to be paid to the Office of Attorney General within 30 days after the Defendant receives written notice from the Office of Attorney General. If no water has seeped into Ambrose's basement within the one (1) year period, the Defendant will not owe any restitution to Ambrose. During this year period, if the seepage is caused by a defective sump pump, which is verified by a third party, then the Defendant shall be given two (2) business days to replace the pump, and shall not owe Ambrose any restitution. However, if Ambrose continues to renew her warranty, or her warranty coverage is otherwise still in effect, then she shall be treated the same as the customers under paragraph 11.

i. Any notice required above shall be sent by certified mail to the following address and the signed receipt shall be proof that Defendant received the notice:

Miken Industries Inc., d/b/a Everdry Waterproofing of Ft. Wayne
ATTN: Robert Burns
6004 Highview Drive #C
Fort Wayne, IN 46818

- e. *Consumer Koetje*: Defendant agrees that it shall pay the Arbitration Award on behalf of Cletabell Koetje, dated April 22, 2004, in the amount of Sixteen Thousand and Eleven Dollars (\$16,011.00). The payment arrangements will be made between the Defendant and Koetje's private attorney. However, the parties agree that the Defendant must pay Koetje in order to fulfil the terms of this agreement.
- f. All restitution payments due under the above restitution provisions shall be paid to the Office of the Indiana Attorney General, which will hold the funds in escrow until

the funds are distributed to the appropriate customers. All payments shall be mailed to:

Indiana Office of Attorney General
ATTN: Eric Jackson
Consumer Protection Division
302 West Washington Street
IGCS 5th Floor
Indianapolis, In 46204

11. Other Customers Whose Transactions Pre-Date the Date the Court Approves this Consent Judgment.

a. Defendant shall act pursuant to numbered paragraphs 8.a through 8.h for any customer, other than those identified in numbered paragraphs 10.a through 10.d, (i) whose contract is dated, or whose waterproofing system was completed, on or after December 23, 2001 up to the date the Court approves this Consent Judgment, or (ii) whose transaction pre-dates the date the Court approves this Consent Judgment but who is current in paying the annual warranty renewal service fee, whose annual warranty renewal service fee has been waived by Defendant, or whose warranty or service contract is otherwise still in effect. For these customers, this protocol shall be modified so that the thirty-day punch-list period does not apply. Instead, Defendant shall have five (5) attempts or one (1) year from the date it first becomes aware of the customer's issue or problem with the system to repair the system so that it functions as described in numbered paragraph 8.g.ii.

b. In the event Defendant is, at the time this Consent Judgment is approved by the Court, already aware of such customers' issues or problems, Defendant shall have five (5) attempts or one (1) year from the date the Court approves this Consent Judgment to repair the system so that it functions as described in numbered paragraph 8.g.ii. All other

terms of paragraphs 8.a through 8.h shall apply to these customers. These customers shall include, but not be limited to the list of costumers who have filed a complaint with the Indiana Office of Attorney General that is attached and incorporated as Exhibit 'A'.

12. Costs. Defendant shall pay Five Thousand Dollars (\$5,000.00) to the Office of the Indiana Attorney General as costs of the Attorney General's investigation and prosecution of this matter.

13. Payment Plan.

a. The monetary portion of the judgment shall be paid under the following terms:

The Defendant shall make a payment of \$5,000.00 to the Office of Attorney General on December 1, 2004. Thereafter, it shall make a payment of \$5,000.00 each month to Office Attorney General. Said payments will be due on the First of each month beginning on January 1, 2004, and shall continue until the entire amount of \$33,795.00 is paid in full.

b. If the Defendant fails to make a payment under 13a then it shall be in violation of this agreement, the unpaid balance shall become immediately due and payable, and Attorney General can seek to enforce this Judgment and collect the entire remaining balance and any additional costs it incurs in the enforcement and collection of this Judgment.

14. Civil Penalties. Defendant shall owe Nineteen Thousand Five Hundred Dollars (\$19,500.00) to the Office of the Indiana Attorney General as civil penalties. These civil penalties shall be waived unless Defendant fails to timely make any payment as required under numbered paragraphs 10.a through 10.e, 12 and 13. In the event of Defendant's failure to timely make any such payment, these civil penalties shall become immediately

due, and shall be in addition to any other remedy or damages Plaintiff is authorized by law to seek from Defendant.

PLAINTIFF STATE OF INDIANA

Stephen Carter
Attorney General of Indiana

By: 

Eric Jackson
Deputy Attorney General
302 West Washington Street
IGCS, 5th Floor
Indianapolis, IN 46204
(317) 233-3987

Attorney No. 19415-49

Dated: 11/16/04

DEFENDANT, MIKEN INDUSTRIES
INC. D/B/A EVERDRY OF FT. WAYNE

By: 

Robert Burns
President
60004 Highview Drive
#C
Fort Wayne, IN 46818

Dated: 11/08/04

APPROVED, ORDERED, ADJUDGED, AND DECREED this 22 day of November, 2004.


Judge, Allen County Superior Court

DISTRIBUTION TO:

PLAINTIFF'S ATTORNEY
Eric Jackson
Deputy Attorney General
302 West Washington Street
IGCS, 5th Floor
Indianapolis, IN 46204

DEFENDANT

Miken Industries Inc., d/b/a Everdry Waterproofing of Ft. Wayne
ATTN: Robert Burns
6004 Highview Drive #C
Fort Wayne, IN 46818